

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT**

IN RE DAVID NOVAK,

Debtor.

BAP No. KS-04-027

DAVID NOVAK,

Appellant,

v.
CARL R. CLARK, Trustee,

Appellee.

Bankr. No. 95-21266-7
Chapter 7

ORDER DISMISSING APPEAL
April 14, 2004

Before McFEELEY, Chief Judge, MICHAEL, and McNIFF, Bankruptcy Judges.

The matter before the Court is the Response to Show Cause Order (“OSC Response”), filed March 31, 2004, by Appellant David Novak. The Appellee has not responded to the OSC Response.

This Court had issued an Order to Show Cause Why Appeal Should Not Be Considered for Dismissal as Untimely on March 15, 2004, because it appeared that the notice of appeal was filed beyond the time period allowed by Fed. R. Bankr. P. 8002. The record indicated that the notice of appeal was filed September 8, 2003, twenty days after entry of the order being appealed (August 19, 2003). Rule 8002 requires that a notice of appeal be filed within ten days of entry of the order being appealed. *See* Fed. R. Bankr. P. 8002(a).

In the OSC Response, Mr. Novak, who is incarcerated, attributes fault to delays by the prison’s mail system, the United States Postal Service, and the bankruptcy court, which he alleges failed to promptly mail him the order and failed to promptly docket his notice of appeal. Mr. Novak states that he did not receive the order being appealed

until August 29, 2003, and he placed his notice of appeal in the prison's outgoing legal mail box on September 1, 2003. He claims that he acted as quickly as he could, any delay in receipt of the notice of appeal constitutes excusable neglect, and his appeal should be heard.

The Court assumes that the term excusable neglect is a reference to Fed. R. Bankr. P. 8002(c)(2), which allows the bankruptcy court to grant an extension of time to file a notice of appeal in certain circumstances, if excusable neglect is shown. That rule does not apply here, for two reasons. First, only the bankruptcy court may extend the time to file a notice of appeal. This Court is without any authority to extend the time period for filing a notice of appeal. Second, the bankruptcy court may consider excusable neglect only if a motion for extension of time is filed within 20 days after the time period has expired. It appears that Mr. Novak did not timely seek an extension from the bankruptcy court, and it is now too late to seek an extension.

The Court notes that Fed. R. App. P. 4(c) provides that an inmate's notice of appeal may be considered timely filed if it is deposited in the prison's legal mail system on or before the last day for filing the notice of appeal. The Court need not order application of that rule, however, because the notice of appeal was due August 29, 2003, but was not placed in the prison's legal mail system until September 1, 2003.

Because the notice of appeal was not timely filed, this Court lacks jurisdiction to hear the appeal. *Deyhimy v. Rupp (In re Herwit)*, 970 F.2d 709, 710 (10th Cir. 1992); *Furst v. Furst (In re Furst)*, 206 B.R. 979, 980 (10th Cir. BAP 1997). The appeal must therefore be dismissed for lack of jurisdiction.

Our dismissal renders moot the Petition and Affidavit for Leave to Proceed In Forma Pauperis ("IFP"), filed by Mr. Novak on March 31, 2004. The Court notes that it has no authority to grant IFP status. *See In re Jeys*, 202 B.R. 153 (10th Cir. BAP 1996) (this court is not an Article III court; only Article III courts may grant IFP status). The IFP Petition will therefore be denied.

Accordingly, it is HEREBY ORDERED that:

1. The appeal is DISMISSED for lack of jurisdiction.
2. The IFP Petition is DENIED.

For the Panel:

Barbara A. Schermerhorn, Clerk of Court

By: 
Deputy Clerk